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ELIZABETH B. ARCHER ET AL.

IBLA 81-319, 81-320 Decided May 31, 1988

Appeals from decisions of the Idaho State Office, Bureau of Land Management, rejecting phosphate prospecting permit applications and
denying approval of assignments in whole or in part. I-3715, et al.

Set aside and remanded.

1. Mineral Leasing Act: Generally--Phosphate Leases and Permits: Permits

A BLM decision to designate an area as a known phos-phate leasing area which did not give consideration to intrinsic economic factors is invalid, and cannot serve as a proper basis to reject a phosphate prospect- ing permit application filed pursuant to sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. | 211(b) (1982). Where BLM, in adjudicating a phosphate pros- pecting permit application, determines the workability of phosphate deposits in an area based on limited con- siderations of whether mining was technically feasible, the decision will be set aside and the case remanded to BLM for further adjudication.

2. Mineral Leasing Act: Generally--Phosphate Leases and Permits: Permits

Where the existence and workability of phosphate in an area is not known, the Secretary is authorized pursuant to 30 U.S.C. | 211(b) (1982), to issue prospecting per- mits. However, the Secretary has discretionary authority not to issue a permit where a determination has been made in the first instance that phosphate development would not be in the national interest.

APPEARANCES: L. Charles Johnson, Esq., Pocatello, Idaho, for appellants; Robert S. Burr, Esq., Office of the Field Solicitor, U.S. Department of
the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This case has been the subject of a previous adjudication by the Board. In Elizabeth B. Archer, 82 IBLA 14 (1984), we set aside, in part, decisions of the Idaho State Office, Bureau of Land Management (BLM), dated January 5, 6, and 13, 1981, rejecting various phosphate prospecting permit applications and denying approval of assignments of the permit applications in whole or in part 1/ because the land, located within the Caribou National Forest,
had been determined to be within known phosphate leasing areas (KPLA's), and, therefore, could only be leased under the competitive provisions of section 9(a) of the Mineral Leasing Act, as amended, 30 U.S.C. | 211(a) (1982). 2/ In order to afford the appellants an opportunity to challenge the KPLA designations and because of uncertainty over the record support-ing those designations, we referred the case to the Hearings Division, Office of Hearings and Appeals, "on the issue of the correctness of the KPLA designations." Id. at 25. We noted:

> We believe that the information supplied by Survey provides strong support for the KPLA designations challenged by appellants.

1/ The case involves the following phosphate prospecting permit applications:

APP. No.	Applicant	Acreage Applied For	Acreage Rejected	Date of Filing App.	Date of BLM Decision
IBLA 81-319					
I-3777	Elizabeth B. Archer	320.00	320.00	10/22/70	1/7/81
I-4975	Elizabeth B. Archer	320.00	280.00	4/12/72	1/5/81
I-5086	Elizabeth B. Archer	91.69	91.69	5/12/72	1/6/81
I-6274	Elizabeth B. Archer	360.00	280.00	11/3/72	1/5/81
I-6295	Elizabeth B. Archer	440.00	360.00	11/16/72	1/5/81
IBLA 81-320					
I-3715	J.D. Archer	353.29	353.29	9/11/70	1/13/81
I-3725	Elizabeth B. Archer	200.00	200.00	9/17/70	1/13/81
I-4294	Elizabeth B. Archer	200.00	200.00	5/11/71	1/13/81
I-4393	Elizabeth B. Archer	200.00	200.00	6/25/71	1/13/81

On June 3, 1984, Earth Sciences, Inc., National Steel Corporation, and Southwire Company filed requests for approval of assignments of the permit applications from Elizabeth B. Archer and J.D. Archer. The assignments are dated Mar. 21, 1974. Application I-4975 was withdrawn at the hearing.

2/ The KPLA designations had originally been made by the Acting Chief, Conservation Division, Geological Survey (Survey). The functions of the Conservation Division, Survey, with respect to onshore mineral leasing, now reside in BLM. Elizabeth B. Archer, supra at 16 n.2. The KPLA's involved herein are the Schmid Ridge, Webster Ranger-Dry Ridge and Aspen Range.

> However, we believe that some explanation should be provided about the disagreement between the recent studies supporting the KPLA designation and the earlier studies which appear to have been overlooked. Moreover, we note that appellants had prospecting permits on some of the lands, drilled, discovered no phosphate, and as a result acquired no preference right to lease. Under the circumstances, we believe appellants should be given an opportunity to offer evidence in support of their contention that the KPLA designations were improper. We consider an evidentiary hear-ing held pursuant to 43 CFR 4.415 to be an appropriate means for resolving those factual issues. BLM will be assigned the burden of making an initial showing in support of its KPLA designations. The KPLA designations will be sustained unless appellants make a clear and definite showing of error.

The case was assigned to Administrative Law Judge Robert W. Mesch, who conducted a hearing on December 4, 1984, in Boise, Idaho. On April 30, 1985, Judge Mesch issued a recommended decision, in which he held that BLM had not satisfied its burden of making an initial showing "that the KPLA designations were correct, and, in fact, showed that the KPLA designations were made on the basis of criteria unrelated to that mandated by the [Conservation Division,] Geological Survey, in its Manual of Instructions and by the Department in its published decisions" (Recommended Decision at 11). Judge Mesch concluded, relying on the testimony of two geologists who had participated in the KPLA designations (Peter Oberlindacher and R. David Hovland), that the designations were based on the standard of "whether the lands are known or believed to contain a mineral deposit that is technically feasible to remove, but not necessarily profitable to mine either at the present time or at some time in the unknown future," rather than the correct standard, i.e., "whether the lands are known or believed to contain a mineral deposit of sufficient value to render its extraction profitable and justify expenditures to that end." Id. at 10. Judge Mesch opted for the standard of economic feasibility, rather thand a standard of technical feasibility, of mining phosphate deposits, citing portions of the Conservation Division Manual and Atlas Corp., 74 I.D. 76 (1967). 3/ In its brief, BLM argues that Judge Mesch improperly adopted the standard of economic feasibility, while appellants, in their brief, argue in favor of adoption of that standard, and that the phosphate prospecting permits should issue.

[1] Before examining the precise issue involved in this case, it is useful if we first review the development of phosphate leasing on Federal land. Section 9 of the Mineral Leasing Act of 1920, 41 Stat. 440, as amended, 30 U.S.C. | 211 (1982), had originally provided that the Secretary of the Interior was "authorized to lease to any [qualified] applicant * * * any lands belonging to the United States containing deposits of phosphates, under such restrictions and upon such terms as are herein specified through advertisement, competitive bidding, or such other methods as he may by

3/ By order dated July 3, 1985, we afforded the parties an opportunity to address the conclusions in Judge Mesch's recommended decision. Both appellants and BLM subsequently filed briefs.

general regulation adopt." It is important to note that, unlike the provisions of the Mineral Leasing Act relating to coal, no express authorization was provided in the statute for the granting of permits to determine the existence or workability of phosphate deposits. Compare section 9 of the Act, 41 Stat. 440, with section 2 of the Act, 41 Stat. 438. 4/

Under the regulatory scheme originally adopted, phosphate leases were awarded noncompetitively. See 47 L.D. 513 (1920); 50 L.D. 503 (1924). In 1935, however, Commissioner Johnson of the General Land Office ended this practice noting that "[t]his system of disposing of phosphate deposits has proved unsatisfactory." See 55 I.D. 317 (1935). In its place, a system of public auctions was substituted. 5/

This new approach, however, apparently also proved to be less than satisfactory. Accordingly, in 1949, an entirely different system for issuance of phosphate leases was implemented. See 14 FR 411 (Jan. 29, 1949) amending 43 CFR Part 196. Under these new procedures, a bifurcated system was utilized. Individuals were authorized to file noncompetitive lease offers. See 43 CFR 196.8 (1954). If the Secretary determined "upon report of the Geological Survey as to the need for further exploration * * * that further exploration [was] necessary before development could reasonably be undertaken" the Secretary could issue a noncompetitive lease to the applicant in the absence of a valid protest. 6/ 43 CFR 196.9 (1954). If, on the other hand, the Geological Survey reported that there was no need for further exploration, the lease would be offered for competitive bidding. 43 CFR 196.10 (1954).

Such was the state of the law when Congress adopted the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. | 211 (1982). This Act provided express authorization for the issuance of prospecting permits "[w]here prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area." 30 U.S.C. | 211(b) (1982). The Act further provided for a preference right lease upon the discovery of a valuable deposit of phosphate within the area covered by a permit. Id.

In its consideration of this legislation, Congress solicited the views of the Department as to its advisability. The Department responded by noting that, should the Act be adopted, it would probably discontinue the

4/ With respect to sodium, while no mention of "workability" of sodium deposits was made in the 1920 Act, the Act did provide for the issuance of prospecting permits and, upon showing a discovery, the subsequent issu- ance of sodium leases. See sections 23 and 24, 41 Stat. 447, as amended, 30 U.S.C. || 261 and 262 (1982).

5/ A similar change occurred as to procedures for leasing non-preference right deposits of sodium. See 55 I.D. 319 (1935).

6/ A valid protest could be based either on a showing that a prior equitable claim existed or by a showing that there was sufficient interest by qualified applicants to justify competitive bidding. 43 CFR 196.8(c) (1954).

practice of issuing noncompetitive leases under 30 U.S.C. | 211(a) (1982). See H.R. Rep. No. 1278, 86th Cong., 2d Sess. 5.

As written, the phosphate permitting section most clearly parallels the then-extant provision relating to the issuance of coal prospecting permits. 7/ Thus, 30 U.S.C. | 201(b) (1970), provided that the Secretary could issue prospecting permits "[w]here prospecting or exploratory work [was] necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area." In view of the remarkable coincidence between this language and that ultimately adopted to authorize the issuance of phosphate permits, 8/ it seems clear that Congress intended that the understanding of the phrase "existence or workability" derived from the Department's experience in coal permitting should control with respect to the issuance of phosphate permits.

A review of Departmental decisions relating to the issuance of coal permits clearly shows that the meaning of "workability," within the context of coal permitting, was definitively established prior to the 1960 phosphate amendments. In Emil Usibelli, A-26277 (Oct. 2, 1951), the Department quoted with approval from Geological Survey Bulletin No. 537 as to the meaning of "workability":

> The workability of any coal will ultimately be determined by two offsetting factors--(1) its character and heat-giving quality, whence comes its value, and (2) its accessibility, quantity, thickness, depth, and other conditions that affect the cost of its extraction. It must be considered a workable coal if its value, as determined by its character and heat-giving quality, exceeds the cost of extraction, either as judged by actual experience at the point where it is found or as judged by actual experience on similar coals similarly situated elsewhere. There are no absolute limits to any of the factors. The mining of 1 inch of coal that may involve the mining of 3 feet of rock is physically possible but would not pay. Most unworkable coal beds lack one or more of three things--quality, thickness, accessibility--that is, they are too poor, too thin, or too deep.

Despite assertions to the contrary appearing in the record below, the above definition has not been altered by either Departmental decision or internal BLM or Geological Survey revisions.

Thus, in Clear Creek Inn Corp., 7 IBLA 200, 79 I.D. 571 (1972), the Board quoted from Usibelli and concluded:

7/ The Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083, as amended, 30 U.S.C. || 201-209 (1982), repealed the authority of the Secretary to issue prospecting permits for coal.

8/ In The Effect of Mining Claims on Secretarial Authority to Issue Prospecting Permits for Coal and Phosphate, M-36893, 84 I.D. 442 (1977), Solicitor Krulitz referred to "the deliberate selection of the coal provision as the model for [the 1960] amendment." Id. at 449 n.7.

> From the foregoing it is apparent that the economics of the extraction process are critical to the determination of the workability of the coal. It is not enough to ascertain that coal is present and that mining it is "physically possible." If it is too thin, too poor or too deep to mine it cannot be considered workable. To be workable its value must at least appear to exceed the cost of its extraction. [Emphasis supplied.]

Id. at 216, 79 I.D. at 579.

Similarly, the Conservation Division Manual, in reviewing Departmental decisions concerning "workability," expressly noted:

> (1) The workability of any coal will ultimately be determined by two offsetting factors.
>
> (a) Its character and heat-giving quality, whence comes its value, and
>
> (b) Its accessibility, quantity, thickness, depth and other conditions that affect the cost of its extraction.

(Conservation Division Manual 671.5.2.B.).

BLM placed much emphasis below on language in decisions such as Atlas Corp., supra, which declared that "it is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success." Id. at 84. This assertion was, and continues to be, a correct statement of law. But it does not mean, as it was apparently interpreted by BLM officials below, that the concept of workability has no economic component. This seeming contradiction was best clarified by Office of Hearings and Appeals Director Day, sitting ex officio in James C. Goodwin, 9 IBLA 139, 80 I.D. 7 (1973). Therein, Director Day noted:

> Although workability is basically a problem of the physical parameters of the coal, the test of workability is dependent upon economic factors. If the value of the coal is greater than the cost of its extraction, the deposit is workable. It is not enough to show that mining is physically possible * * *.
>
> Workability as defined by the USGS is concerned with the economics of the intrinsic factors. Extrinsic factors such as transportation, markets, etc., are not considered. However, the cost of mining must be considered. In its classification of coal lands, USGS has anticipated and assumed the ultimate coming of conditions favorable for mining and marketing of any coal if the coal is workable in terms of the intrinsic factors. In this respect, the test of workability under the Mining Leasing Act differs from the prudent man rule under the mining laws.

Id. at 155-56, 80 I.D. at 15-16. We believe that a proper understanding of the foregoing is critical to any attempt to determine whether or not a phosphate deposit is properly deemed to be "workable."

Thus, when the officials in charge of establishing the KPLA's declared that the Manual provisions were "way outdated" (Tr. 85) and that workability could be established purely as a determination of whether mining was "technically feasible" (Tr. 97), they were in error. 9/ To the extent, therefore, that KPLA's were established without regard to the proper test of "workability," they must be deemed to have been invalidly established and cannot serve as a proper basis for rejection of phosphate prospecting permits which had been filed prior to the KPLA designation.

However, since workability is concerned only with intrinsic costs of mining a deposit, it necessarily follows that the mere fact that a deposit has been found to be "workable" cannot guarantee that a mining operation will be economic, since a finding that a deposit is "workable" does not imply that extrinsic costs of production can be recovered. Thus, to the extent that appellants and Judge Mesch contended that a deposit must be "commercial," as that term is generally understood, in order for it to be deemed "workable," they, too, were in error. 10/

It can be seen, therefore, that both BLM and appellants have proceeded in arguing their respective cases from an invalid basis. We have indicated above that we can ascribe no controlling significance to the KPLA designations in the instant case since they were clearly premised on a flawed interpretation of workability. But, quite apart from the propriety of a classification designation, no prospecting permit could properly be issued for lands which contain a deposit of phosphate which is known to be workable. A review of some of the testimony by BLM's experts reveals that the

9/ It is possible that part of the confusion on this score was occa-sioned by the failure of BLM counsel to introduce at the hearing the Manual provisions on workability. Two Manual provisions were introduced as Exhibit 13. The first of these was the Conservation Division Manual
Part 613.3 relating to designation of leasing areas. The other provision, Conservation Division Manual 671.4, also concerned the establishment of known leasing areas. While both of these had references to the concept of "workability," neither of them defined it. However, Conservation Division Manual 671.5 is solely directed to the concept of "workability." This provision cites numerous Departmental precedents relating to workability determinations including Usibelli. Reference to this provision in conjunction with the other two might well have rectified some of the misunderstandings apparent from the transcript of the hearing.
10/ Thus, a "commercial deposit" is defined as "deposit of oil, gas or other minerals in sufficient quantity for production in paying quantities. As generally used in the industry, it is sufficient oil or gas to repay the cost of drilling, equipping, completing and operating as well plus some profit." Williams & Meyers, Manual of Oil and Gas Terms, 68 (6th ed. 1984). Thus, a commercial deposit would generally imply recovery of both intrinsic and extrinsic costs.

evidence might be sufficient to posit a finding of workability, using the correct standard, as to certain of the areas for which application was made. In this regard, we wish to emphasize that, unlike the requirements for showing a discovery of a valuable mineral deposit under the mining laws, geologic inference, by itself, may be a sufficient basis on which to predicate a finding of workability. See e.g., James C. Goodwin, supra at 157, 80 I.D. at 16; American Nuclear Corp., A-30808 (Mar. 5, 1968). We therefore conclude that the proper course of action in the instant appeal is to remand the matter to BLM for a determination, with respect to each specific parcel involved, whether or not the evidence establishes that workable phosphate (as defined herein) exists in the lands sought, at the present time.

We take this course of action with some reluctance. We are aware that an extended period of time has elapsed since these prospecting permit applications were first filed. Nevertheless, the law is clear that the mere filing of a prospecting permit application gives an applicant no right to the permit. The filing of the permit application merely affords the applicant a priority right to a permit should a permit subsequently be issued. Moreover, the Department has repeatedly held that it has no authority to issue a prospecting permit where the evidence establishes that there exists a workable phosphate deposit in the land sought. Atlas Corp., supra; John D. Archer, A-29974 (June 16, 1964). Therefore, if at any time prior to the issuance of a prospecting permit it is determined that a workable phosphate deposit exists, the Department cannot issue the permit. See Claude P. Heiner, 70 I.D. 149 (1963). It is, thus, necessary to ascertain at the present time whether any of the lands embraced within appellant's permit applications embrace a known workable phosphate deposit. If so, such land must be excluded from any permit which might issue.

[2] Finally, we must comment on BLM's contention that, under the present statutory scheme, it has essentially unfettered authority to refuse to issue a prospecting permit even where the existence or workability of a phosphate deposit has not been shown, but may instead issue a phosphate lease. BLM bases its assertion on the language of the statute wherein it is provided that

> [w]here prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any [qualified] applicant * * * a prospecting permit. 30 U.S.C. | 211(b) (1982). [Emphasis supplied.]

Relying on the underlined language, BLM argues that there is

> no command in the legislation that changes the Secretary's discretionary authority in the determination of whether he would lease or issue prospecting permits other than the directive that he is authorized to issue prospecting permits where he finds prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits.

(Government Brief at 6-7). We do not agree.

As we noted above, the phosphate permit section, 30 U.S.C. | 211(b) (1982), was modelled after the then-existing coal permit section, 30 U.S.C. | 201(b) (1970). So far as we are aware, the Department never asserted that it possessed the authority under section 201 to issue a coal lease where it was admitted that prospecting or exploratory work was necessary to determine the existence or workability of coal deposits. To the contrary, a review of the numerous cases discloses that adjudication invariably proceeded on the assumption that, if the existence or workability of the coal was unknown, the only proper course of action was issuance of a prospecting permit.

The use of the phrase "the Secretary of the Interior is authorized" is not without meaning, but its meaning is substantially different from the interpretation now pressed on us by BLM. This phrase does not mean that the Secretary is free to issue a lease or a permit regardless of the underlying factual situation. Rather, it means that the Secretary or his delegate reserves the authority not to issue either instrument, as an initial matter, where a determination is made that phosphate development would not be in the national interest. Such a determination could be based on environmental concerns, or fear that phosphate mining might interfere with other mineral or nonmineral uses of the land, or similar considerations. But even such a discretionary action must be supported by facts of record.

Thus, we note in the instant case that the Forest Service had recommended against leasing certain parcels because, based on the Diamond Creek Land Management Plan (LMP), it felt that only mineral leases should issue which formed parts of logical mining units. The Forest Service had also recommended against permitting other parcels because phosphate exploration would interfere with important elk winter range. Elizabeth B. Archer, supra at 16. In our earlier decision, we affirmed rejection of the permit applications to the extent that they embraced land within the elk winter range. Id. at 24-25. However, we set aside the decision rejecting lands not within a KPLA solely on the basis of the Diamond Creek LMP and ordered BLM to reassess the issue. Id. at 24. Our actions therein were totally consistent with the recognition of the authority to refuse to issue prospecting permits, as well as consonant with the requirement that where discretionary authority is being exercised, the justification therefor appears of record.

We therefore conclude that, to the extent that BLM now asserts that, where the evidence does not establish either the existence or the workability of a phosphate deposit, it is authorized under 30 U.S.C. | 211 (1982), to issue either a lease or permit, its argument is not well taken.

Accordingly, in view of the foregoing and pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we hereby decline to accept the recommended decisions of Administrative Law Judge Mesch, we set aside the decisions of the Idaho State Office, and we remand the matter to it for further consideration in accordance with the views expressed above. In conjunction with our reconsideration, we direct that BLM reassess the desirability of issuing phosphate permits I-3715, I-3725, I-4294, and I-4393 for lands not included in the KPLA but which had been rejected solely on the basis of the Diamond Creek LMP for reasons not related to the elk winter range. In view of the

extended period of time which has already elapsed, we would recommend that the above actions be expedited consistent with other obligations entrusted to the State Office.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge